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No.: 10-1301

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

HARRISTON L. BASS, JR., Petitioner
-vs-
THE STATE OF NEVADA, Respondent

On Petitioner for Writ of Certiorari
To The Supreme Court of the State of Nevada

Reply to Respondent's Brief in Opposition

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

1. FACTS 1

ARGUMENT 2

Question 1 2-3
Question 2 3-4
Question 3 4-7

CONCLUSION 7

TABLE OF AUTHORITIES

CASES:	Page
Alcorta v. Texas, 355 U.S. 28 (1957)	7
Hanley v. State, 85 Nev. 615, 460 P.2d 162 (1969)	7
Morissette v. United States, 342 U.S. 246 (1952)	4
Napue v. Illinois, 360 U.S. 264 (1959)	7
Strickland v. Washington, 446 U.S. 668 (1984)	2
UNITED STATES CONSTITUTION	
Sixth Amendment U.S. Constitution	2,3
STATUTES AND REGULATIONS:	
NRS 200.010	3
NRS Chapter 453	3,6
NRS 453.226	3,4
NRS 453.231	4
NRS 453.226-232	3
NRS 453.321	3
NRS 453.232	3,4
NRS 453.332	4
NRS 453.333	3
Nevada Rules of Professional Conduct – Rule 3.8	
Supreme Court Rules	

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

This Reply is submitted pursuant to Supreme Court Rule 15 (6) and is believed necessary to point out certain oversights "perceived mis-statements" presented in Respondent's Opposition. These may appropriately be considered "new points raised in a brief in opposition, . . .".

1. FACTS

Petitioner "Bass" has selectively presented to this Court only three issues which, although interrelated among themselves and other non-presented issues, are considered to have the most significant constitutional import.

Respondent's Statement of Facts purports to identify Bass' State-Appeal Issues by essentially quoting from the Nevada Supreme Court's Order of Affirmance (Appendix "A" 13-30 at 14). Said Court lists twelve issues which it believes Bass is arguing. In fact, the underlying appellate proceedings, the basis for this Writ, consisted of two consolidated appeals (No. 51822 and No. 53072). The first appeal presented thirteen issues and the second appeal seven. The first issue in Case No. 51822 was unprepared or ineffective assistance of trial counsel. Ineffective (unpreparedness) of trial counsel was also identified as an issue in No. 53072. While the Nevada Supreme Court may have omitted or chosen not to address this issue, it is entirely inaccurate to suggest that Dr. Bass didn't raise it and is now raising it for the first time.

ARGUMENT

Question 1.

It is correct that the Nevada Supreme Court's Order of Affirmance (Appendix "A" 13-30 @ 30 ftn. 4) delegated Bass' ineffective assistance of counsel VI Amendment right (*Strickland v. Washington*, 446 U.S. 668 (1984) to a footnote. Interestingly the Order of Affirmance did not hesitate to point out infirmities in counsel's performance i.e. failure to object, failure to discover exculpatory evidence, etc. as related to other issues in his appeal. However, the Court declined to address them in a Sixth Amendment context at that time.

It should also be pointed out that Bass' second consolidated appeal arose from a Motion for New Trial Based on Newly Discovered Evidence which specifically raised the ineffective assistance of counsel claim. This was before the same trial judge who said his counsel would never be prepared and who witnessed said counsel's trial performance.

In the Order Denying Defendant's Motion for a New Trial (A-3-10), the trial judge finds the evidence in question was not newly discovered since Defendant (his counsel) knew or should have (through reasonable diligence) of the existence and import of said evidence.

While the denial of a Motion to Continue may be a matter of discretion, the constitutional right to effective assistance of counsel is not. When trial counsel candidly admitted he was unprepared the judge made no inquiry as to why or how much time was needed. More importantly she made no inquiry to Dr. Bass as to whether he was aware of his counsel's unpreparedness and was ready or willing to proceed.

The Sixth Amendment right to counsel is arguably the most important of an accused's constitutional guarantees. Other rights (impartial jury, confrontation, right to testify, etc.) are generally closely scrutinized by the Court and inquired into at the time. The Nevada rule appears to postpone this inquiry until well after the damage has been done.

Question 2.

In addressing the constitutionality of the statutory scheme, it is interesting to note that Respondent omits any discussion of NRS 453.226-232. The reason Bass uses the phrase "statutory scheme" is that there is no single complete statutory definition of the murder charge of which he was convicted. What we have is a pyramid of statutes: NRS 200.010 **Murder**, NRS 453.333 **Penalties for making available controlled substance which causes death**, NRS 453.321 **Offer, attempt, or commission of unauthorized act relating to controlled or counterfeit substances** . . ., and finally NRS 453.232 **Penalty for failure to register**. NRS 453.232 is in the regulatory (not the offenses and penalties) section of Chapter 453 and constitutes Dr. Bass' only alleged violation.

NRS 453.332 "requires a violation of this chapter and NRS 453.321 provides "Except as authorized by the provisions of (this chapter)."

All we have then is strict liability for a medical doctor who unknowingly, negligently, or intentionally was not considered by the Board of Pharmacy to be properly registered. There is no element of *mens rea*. *Morissette v. United States*, 342 U.S. 246 (1952). It is small wonder then that Respondent's

Opposition does not discuss the regulatory registration provisions NRS 453.226, 231, and 232. Moreover those provisions were also not addressed in the Nevada Supreme Court's Order of Affirmance.

Question 3

Was Dr. Bass' conviction based on the introduction and advocacy of false evidence?

The State's Opposition again avoids answering the question of when it (the prosecution and investigative agents) knew that the evidence they introduced and argued was false. While their unwillingness to do so may be understandable, the fact remains that Dr. Bass has been in jail three years now based upon this evidence. At every opportunity in post-conviction Motions and briefs since discovering beyond any doubt that the evidence was false Bass has asked the same question. Although omitted from the Opposition, the closest the State ever came to acknowledging this was in its Answer directed by Nevada Supreme Court's Order of November 24th, 2010 relating to whether Appellant's conviction was based on false evidence. Therein the State submitted:

> "Bass points to selected language in the prosecutor's opening statement and closing argument and argues that the State presented false evidence. However, Bass fails to recognize that the jury was instructed that argument by counsel is not evidence and their decision must be based only on the facts and evidence presented during the trial.
>
> (AA Vol.X p.2092)

> Therefore, even if the prosecutor made one statement about how the Allscripts prescription bottle tied into Gina Micali's death, it is presumed the jury followed this instruction and based their decision only on the evidence."
>
> (A-57)

This novel argument that the State can represent or misrepresent whatever it wants and the effect of which is cured by a jury instruction was understandably abandoned in Respondent's Opposition. It is, however, illustrative of the lengths they might go to in an effort to preserve the conviction.

Finally, the Respondent's Opposition completely ignores the Court's instruction to the jury on the murder count which deserves repeating:

> "INSTRUCTION NO. 5
>
> In order to find the Defendant Guilty of Second Degree Murder (Sale of a Controlled Substance Causing Death), the State must prove each of the following elements beyond a reasonable doubt:
>
> 1.That on or about October 4-6, 2005, in Clark County, Nevada;
>
> 2. The Defendant unlawfully:
>
> 3. Killed a human being;
>
> 4. The death was proximately caused by a controlled substance;
>
> 5. The controlled substance was sold, given, traded or otherwise made available to the victim by the defendant;
>
> 3. In violation of Nevada Revised Chapter 453."
>
> (Emphasis added) (X-2075).

Although this instruction is disjointed, vague, and of poor syntax, it is clear that October 4th-6th must mean something and therefore apply to all purported elements.

The State now suggests that it didn't need the false evidence since the controlled substance could have been provided on some other date. This is not what the witnesses, exhibits, prosecutor, and judge submitted to the jury. Amanda Burney's false or erroneous identification was confirmed by her Medication Receipt, State's Exhibit 16 (VI-1323 & 1324).

There can be absolutely no question but that the judge and jury were misled to believe that the half-full (missing 51 pills) bottle of hydrocodone which Amanda Burney identified as being provided to Gina Micali on October 4th, 2005 was the cause of death. This was the bottle she destroyed after flushing the contents down the toilet.

The conviction was based upon the introduction and argument of false evidence. *Hanley v. State*, 85 Nev. 615, 617, 460 P.2d 162 (1969) addresses the prosecutor's standard of fairness within a due process context:

"1. Due process forbids the state from deliberately misrepresenting the truth, and a conviction that rests in part upon such false evidence must be set aside. *Miller v. Pate, supra*. Equally offensive is an instruction by the prosecutor to his witness to withhold significant evidence favorable to the accused. When that evidence is not revealed, the conviction cannot stand. *Alcorta v. Texas*, supra. If the state knows that its witness has testified falsely on a point relevant to the credibility of that witness, and fails to correct that falsehood, the conviction is constitutionally infirm. *Napue v. Illinois, Supra*."

Napue v. Illinois, 360 U.S. 264 (1959) and *Alcorta v. Texas*, 355 U.S. 28 (1957) were among the federal authorities cited in *Hanley*.

CONCLUSION

The Court should grant Bass' Petition for Writ of Certiorari. The Constitutional violations are all established and compelling. This has resulted in the destruction of Dr. Bass' medical career and his present incarceration.

Respectfully Submitted

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